SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 963

HARRY MEYER KATZ, M.D.,
Petitioner,

vs.

STATE BOARD OF MEDICAL EXAMINERS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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OPINION BELOW

The Petitioner has omitted the opinion and decision of the District Court of Appeal, Third District, from his appendix. For this reason the Respondent has included this decision in its appendix (App. A).

JURISDICTION

The jurisdiction of this Court is improvidently invoked under 28 U.S.C. 1257 (3) because no right, title or immunity was claimed, invoked or timely raised below causing a waiver of any federal question.

FLORIDA STATUTE 120.26 (2)

> The agency shall afford all parties authorized by law to participate in an agency proceeding the right, to
>
> (2) Submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

QUESTION PRESENTED

WHETHER AN ACCUSED PHYSICIAN WAS DENIED DUE PROCESS OF LAW WHERE WITNESSES, WHOSE NAMES HAD NOT BEEN PREVIOUSLY FURNISHED TO HIM BY WRITTEN INTERROGATORIES, WERE PERMITTED TO GIVE TESTIMONY AGAINST HIM WHEN THERE HAD BEEN AN ADJOURNMENT OF AN ADMINISTRATIVE TRIAL TO AFFORD PETITIONER, THROUGH COUNSEL, AN OPPORTUNITY TO CONFER WITH THE WITNESSES PRIOR TO THEIR GIVING TESTIMONY AND THEN NO OBJECTION WAS ENTERED OR LODGED AGAINST THEIR TESTIMONY UNTIL THEY HAD COMPLETED TESTIFYING.

STATEMENT OF THE CASE

Petitioner HARRY MEYER KATZ was charged in Counts Ten, Eleven, Twelve and Thirteen of the Complaint with unprofessional conduct in the practice of medicine by reason of making fraudulent FAA examinations (App. A). It is important to a complete understanding of this cause to realize that no assault is made by Petitioner upon any of those counts or the sufficiency of the testimony and evidence to sustain and support the counts. Assuming, *arguendo*, the validity of Petitioner's contention there could only logically and properly be a partial reversal of the cause which under the law of the State of Florida would leave Petitioner's license revoked and in effect leave him in the same position he is now in.

In addition to the above counts, Petitioner was additionally charged by Counts Fourteen and Fifteen with aiding, abetting, counselling, hiring or otherwise procuring an unlicensed and incompetent physician (a manic depressive) to practice medicine and surgery at a hospital owned and operated by Petitioner (App. B). The penultimate charges charged him simply with aiding and abetting an unlicensed, incompetent physician to practice medicine. In the preamble to the actual accusation the names of two patients upon whom medicine and surgery was practiced are mentioned. At this point it is important to emphasize that the Petitioner does not contend that the accusation with respect to the two named patients or the evidence in support thereof was not competent or substantial to support the charges and allegations against Petitioner. Again, assuming *arguendo* the validity of Petitioner's contention, the most that he could expect from the aid of this Court would be a partial reversal which

under the law of the State of Florida would leave him in the same position he now finds himself in. Petitioner's assault on the judgment of revocation, specious though it is, is much more *rarified*. The entire thrust of his contention is simply that he was not furnished with the names of material witnesses who testified against him in respect to Counts Fourteen and Fifteen. Specifically, Petitioner claims he was faced with surprise witnesses and denied due process of law because JUSTINA TROMMER and GLORIA MATHIS testified against him with respect to Counts Fourteen and Fifteen of the Amended Complaint. The Respondent has not been favored with an index to the record in this cause now lodged before this Court but will concede that prior to the administrative trial Petitioner, through counsel, requested a list of witnesses by the vehicle of written interrogatories. Written answers to those interrogatories were served upon Petitioner's counsel and it is conceded that the answers to interrogatories did not contain the name of either JUSTINA TROMMER or GLORIA MATHIS. When GLORIA MATHIS and JUSTINA TROMMER were called, Petitioner, through counsel, objected to their testimony (R 190-201). Petitioner's objection resulted in a recess and conference for the purpose of permitting Petitioner's counsel to confer with and interrogate both witnesses (R 201). After the recess and conference both witnesses were called and gave testimony against Petitioner upon Counts Fourteen and Fifteen. Neither Petitioner nor his counsel objected to their testimony (R 202-214). After the witnesses were excused and later in the hearing Petitioner complained of their testimony and moved to strike it from the record. Thus Petitioner waived any objection to the witnesses' testimony and failed to timely or properly raise and preserve any federal question.

Next, Petitioner complains of the testimony given by PAUL LAWRENCE BEREZNEY (son of the unlicensed, incompetent physician) and that of RAYMOND ALLEN GREEN. Again it is true that neither the Complaint nor the witness list furnished in the answers to interrogatories contained the names of PAUL LAWRENCE BEREZNEY or RAYMOND ALLEN GREEN. However, these witnesses were simply used and employed as rebuttal witnesses. To the Complaint and Amended Complaint (App. A and B), Petitioner filed a Motion to Quash and an Answer in the nature of a general denial (R 110-111). At the trial, however, he attempted to mitigate and explain the employment of the unlicensed and incompetent physician in the role of a "surgical technician" rather than in the role of "physician." Thus, Petitioner admitted the physical presence and working of the individual but denied he rendered services in the traditional role of a physician and surgeon. To refute this testimony it was perfectly proper for the BOARD to call PAUL LAWRENCE BEREZNEY and RAYMOND ALLEN GREEN as rebuttal witnesses. Suffice it to say that these witnesses completely dispelled the employment and utilization of the incompetent and unlicensed physician as a "surgical technician."

The Final Judgment of Revocation entered by the Respondent shows that the Respondent sitting as the trier of fact rejected the testimony presented by the Petitioner and accepted that which was offered against him. In addition, the Order correctly recites hospital records and charts which demonstrate that the unlicensed, incompetent physician was charted as a treating and consulting physician. Under the common law and Florida practice rebuttal witnesses need not be divulged in advance of

their actual use for to do so would destroy their effectiveness. The use of rebuttal witnesses is expressly permitted by *Florida Statute* 120.26 (2).

THE FEDERAL QUESTION WAS NOT RAISED

As pointed out in the Statement of the Case, Petitioner initially objected to the testimony of GLORIA MATHIS and JUSTINA TROMMER and ultimately objected to their testimony and moved to strike the same. However, at the critical period just following his conference after a recess for that purpose, the Petitioner, through his counsel, did not object to their testimony until they were excused from attendance. There was, therefore, no federal question raised or presented. Under these circumstances, the Petition for Writ of Certiorari should be denied. *Zucht* v. *King*, 260 U. S. 174 and *Palmer Oil Company* v. *Amerada Corporation*, 343 U. S. 390.

The orders and decisions of the Florida courts show on their face that no federal question was presented or decided by those courts for the reasons and matters above referred to. (See App. F and H and Respondent's App. A) There was no federal or state question of due process of law to be decided by the courts of Florida because none was raised and the objection to the use of the testimony was waived.

REASONS FOR DENYING THE WRIT

No federal question was timely or properly presented below. Any objection to the Respondent's witnesses in chief were cured and waived because Petitioner, through counsel, interrogated the witnesses at a recess called for that purpose and thereafter did not object to their testimony until after they had completed testifying and had been excused from further attendance as witnesses. The use of rebuttal witnesses was perfectly proper to dispell the Petitioner's affirmative defense.

This case turns upon the facts and circumstances of this record rather than the denial of any federally constituted right of the Petitioner.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida was mailed to Strauss & McCormick and Milton E. Grusmark, of Counsel, Attorneys for Petitioner, Suite 1104 Concord Building, 66 West Flagler Street, Miami, Florida, 33130 this 3 day of February, 1969.

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